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No. 94-203

In the Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, ET AL., APPELLANTS

v.

OLIVER NORTH FOR UNITED STATES SENATE COMMITTEE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the decision of a political party to require voters to pay a fee to participate in the party's convention for nominating a candidate for the United States Senate is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973c.

2. Whether voters may bring a private action under the anti-poll-tax provision of the Act, 42 U.S.C. 1973h.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Case—Continued: Page

Constitution, statutes and regulations:

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INTEREST OF THE UNITED STATES

This case involves the extent to which Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, covers the activities of political parties. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted for administrative preclearance; she is also responsible for defending declaratory judgment actions brought in the United States District Court for the District of Columbia seeking judicial preclearance. The Act also gives the Attorney General authority to bring actions to prevent unprecleared changes from taking effect. The Court's resolution of this case will therefore affect the Attorney General's enforcement responsibilities under Section 5.

On January 4, 1995, in response to this Court's invitation, the Solicitor General submitted a brief expressing the views of the United States. The brief supported appellants' position and recommended that the Court note probable jurisdiction.

STATEMENT

This case involves the decision of the Republican Party of Virginia (the Party) to elect its 1994 nominee for the United States Senate at a convention open only to voters who paid a $35 or $45 fee. Appellants are three individuals registered to vote in Virginia. They contend that the Party's decision to require the fee violated the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.*, in two ways: (1) the Party did not obtain preclearance for the fee, as required by Section 5 of the Act, 42 U.S.C. 1973c; and (2) the fee violates the anti-poll-tax provision in Section 10 of the Act, 42 U.S.C. 1973h. A three-judge court dismissed appellants' claims under Section 5 and Section 10 for failure to state a claim for which relief could be granted.[1]

1. Virginia law authorizes a political party to place its nominee for the United States Senate on the general election ballot if the party received at least 10% of the vote in any race in either of the two preceding statewide elections. Virginia law also authorizes a party to select its senatorial nominee by a primary election or other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

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[1] In this posture, the allegations in appellants' complaint must be taken as true, *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977), and the dismissal of their claims under Section 5 and Section 10 of the Act cannot be upheld "unless it appears beyond doubt that the [appellants] can prove no set of facts in support of [those] claim[s] which would entitle [them] to relief," *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also, *e.g.*, *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) (reviewing dismissal of equal protection claim on appeal).

The Party has used a variety of means to select its senatorial nominees. See David S. Johnson Aff. (Johnson Aff.) ¶ 3, attached as an addendum to The Republican Party of Virginia's Mem. of Law Opposing Pls.' Mot. for a Prelim. Injunction. In 1964, for example, the Party's senatorial nominee was selected by its State Central Committee, after a convention called for that purpose refused to nominate a candidate to oppose Senator Harry Byrd. In most later election years, however, the Party chose its senatorial nominee at a convention. See Mot. to Affirm or Dismiss 3 n.1; Johnson Aff. ¶¶ 13, 15. In 1990, which was the senatorial election year immediately preceding the one at issue in this case, the Party decided to select its nominee at a primary election, but the election was cancelled because no one challenged the Party's incumbent. See Johnson Aff. ¶ 14. The Party has never sought judicial or administrative preclearance of those changes in its nominating process under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Compl. ¶ 47.

For the 1994 senatorial election, the Party decided to select its nominee at a convention to be held on June 3, 1994. Compl. ¶ 12; see Johnson Aff. ¶ 16. According to the Party's Plan of Organization, delegates to such a convention are to be selected at local "mass meetings," which are open to anyone registered to vote in Virginia who supports the Party's principles and is willing to declare his or her support for the Party's nominee. Johnson Aff. ¶¶ 4-5. Although the Plan provides for the convention delegates to be "elect[ed]" at these mass meetings, *id.* at ¶ 5, in practice any qualified voter who wants to be a delegate and shows up at a mass meeting is chosen as a delegate. Compl. ¶ 14; see Mot. to Affirm or Dismiss 2.

A person cannot, however, attend the Party's convention merely because he or she has been selected as a delegate. Instead, the delegate must also pay a non-refundable fee to the Party. The amount of the fee has increased over

the years. For the 1994 convention, the fee was $35 or $45, depending on the locality from which the delegate was selected. Compl. ¶ 16; see Johnson Aff. ¶ 11. Appellants allege that the Party's practice of charging the fee was not in effect on November 1, 1964 (the effective date for Virginia's coverage under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c). Compl. ¶ 11. Nonetheless, the Party has never sought preclearance of the fee under Section 5 of the Act. Compl. ¶¶ 46-47.

2. Appellants are registered voters in Virginia who wanted to attend the Party's 1994 convention. Appellants Kenneth Bartholomew and Kimberly Enderson were deterred from attending by the fee requirement. Appellant Fortis Morse learned of the fee requirement when he went to the headquarters of the Albemarle County Republican Party in February, 1994, to register as a delegate. Because Morse did not have enough money in his bank account to pay the $45 fee, he asked a party official whether it could be waived. The official said no. Morse borrowed the money from a friend and was permitted to register as a delegate only after paying the fee. Compl. ¶¶ 4-6, 17-25, 35-39.

While at the Party's county headquarters, Morse met an official of the Oliver North for United States Senate Committee (North Committee). The North Committee official gave Morse $45 to repay his friend when Morse indicated that he would support North at the Convention. Morse repaid the North Committee. The Party has retained Morse's $45. Compl. ¶¶ 26-33.

3. On May 2, 1994, appellants filed their five-count complaint in this action in the United States District Court for the Western District of Virginia. Counts 1 and 2 charged that the fee violates the Twenty-Fourth and Fourteenth Amendments to the Constitution. Compl. ¶¶ 41-44. Counts 3 and 4 alleged that the fee violates Section 5 of the Act, 42 U.S.C. 1973c, because it was not precleared, and Section 10 of the Act, 42 U.S.C. 1973h,

because it is a poll tax. Compl. ¶¶ 45-49. Count 5 charged that the North Committee violated the anti-vote-buying provision of the Act, Section 11(c) (42 U.S.C. 1973i(c)). Compl. ¶¶ 50-51. The complaint sought, among other relief, preliminary and permanent injunctions preventing the Party from imposing the fee and ordering it to return Morse's $45. Compl. ¶¶ 6-7, 9.

A three-judge court was convened to consider appellants' claims under Section 5 and Section 10 of the Act. See 42 U.S.C. 1973c, 1973h(c); 28 U.S.C. 2284(a). After expedited briefing and a hearing, the court granted appellees' motion to dismiss those claims. J.S. App. A2-A14.[2]

With regard to appellants' Section 5 claim, the court recognized that political parties are subject to Section 5 "to the extent they are empowered by the State to conduct primary elections for purposes of selecting national convention delegates." J.S. App. A8. But the court held that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." *Id.* at A8-A9. The court believed that this holding was supported by the regulation of the Attorney General that cites changes in party rules for primary elections as one example of a type of change that is covered by Section 5. J.S. App. A9-A10 (discussing 28 C.F.R. 51.7). The court also relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). In

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[2] The three-judge court remanded appellants' Section 11(c) claim and their constitutional claims to a single-judge district court. Appellants voluntarily dismissed the Section 11(c) claim and asked the single-judge court to postpone consideration of the constitutional claims. J.S. 6 n.6. The only claims before this Court are the claims in Counts 3 and 4, alleging violations of Section 5 and Section 10 of the Act.

Williams, the district court held that Section 5 did not cover a party's decision to change its method of selecting delegates to a national convention from a system under which they were appointed to a system under which they were chosen in open convention. See J.S. App. A10. The court in this case concluded that, because the fee at issue here was imposed in connection with a convention, rather than a primary, the Section 5 challenge to the fee had to be dismissed. J.S. App. A10-A11.

In dismissing appellants' Section 10 claim, the court held that actions under Section 10, the anti-poll-tax provision of the Act, may be brought only by the Attorney General, and not by a voter subject to a poll tax. J.S. App. A11-A12. The court based that holding on the fact that Section 10 of the Voting Rights Act does not expressly authorize private actions. *Id.* at A12. The court recognized that in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 of the Act is enforceable by private actions, even though it, like Section 10, does not expressly authorize them. J.S. App. A12. The court observed, however, that Section 10 differs from Section 5, because Section 10 expressly authorizes enforcement actions by the Attorney General. J.S. App. A12.

SUMMARY OF ARGUMENT

1. A. Section 5 applies to "all entities having power over any aspect of the electoral process within designated jurisdictions." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). The Attorney General has accordingly interpreted Section 5 to cover political parties when they perform a state-delegated "public electoral function" in a manner that affects "voting" within the meaning of the Act. 28 C.F.R. 51.7. The lower courts have endorsed the Attorney General's interpretation.

B. The Party's decision to impose a fee on delegates to its 1994 convention fits the criteria for Section 5 cover-

age adopted by the Attorney General and endorsed by the lower courts. In holding a convention to nominate a senatorial candidate, the Party was carrying out a state-delegated public electoral function, because, by operation of Virginia law, the nominee chosen at the convention gained automatic access to the general election ballot. The Party's decision to impose the fee also affected voting in the general election by excluding people who could not pay the fee from the process of selecting the nominee whose name would appear on the general election ballot. This Court has held that similar changes affect voting. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 174-181 (1985).

C. The district court erred in holding that Section 5 applies when a political party holds a primary election, but not when it holds a convention, to select a nominee whose name will appear on the general election ballot. Whether the party uses the primary-election method or the convention method of nomination, it performs a state-delegated public electoral function. See *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953). Moreover, changes in the rules for participating in nominating a candidate at a convention, like changes in the rules for participating in a primary election, may affect voting in the general election. In holding that party conventions nevertheless fall outside Section 5, the district court violated the principle that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *Hampton County Election Comm'n*, 470 U.S. at 178. Nor was the district court's holding required by this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). The district court in *Williams* recognized that rights associated with the selection of delegates to a nominating convention "are the type of rights Congress intended to safeguard" in Section 5. *Williams*, slip op. 4.

D. Section 5, as construed in the Attorney General's regulation, applies to party convention rules in a "workable" manner. Cf. *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 505 (1992). Under that regulation, changes in convention rules must be precleared when they relate to the nomination of a candidate whose name will appear on the general election ballot. Many other convention rules are not subject to preclearance under the regulation. For example, preclearance is not required for rules regarding the drafting of the party platform, and generally is not required for rules regarding administration of the party, unless they involve the exercise of a state-delegated public electoral function or elections for party office.

E. The application of Section 5 to party convention rules does not unconstitutionally interfere with a party's freedom of association. This Court made clear in *Allwright* and *Terry* that, when a party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Nor do they negate the protection afforded by Section 5, which was enacted to enforce the Fifteenth Amendment.

2. The district court's holding that private parties may not invoke the remedies against unlawful poll taxes in Section 10 of the Act conflicts with this Court's decision in *Allen*. *Allen* held that voters may bring private actions under Section 5, even though the Act does not expressly authorize such actions. The reasoning of *Allen* applies here.

ARGUMENT

I. THE DECISION OF THE REPUBLICAN PARTY OF VIRGINIA TO IMPOSE A FEE ON DELEGATES TO ITS CONVENTION FOR SELECTING A SENATORIAL NOMINEE IS A CHANGE "WITH RESPECT TO VOTING" UNDER SECTION 5 OF THE VOTING RIGHTS ACT

A. Section 5 Applies To A Political Party When The Party Exercises A State-Delegated Public Electoral Function In A Way That Affects "Voting" Within The Meaning Of The Act

Section 5 of the Voting Rights Act prohibits certain jurisdictions, including Virginia, from changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" until the change has been precleared by either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c.[3] The preclearance requirement applies only to changes that have a "direct relation to, or impact on, voting." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 506 (1992). The term "voting" is defined broadly under the Act, 42 U.S.C 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appro-

[3] To obtain preclearance, a covered jurisdiction must demonstrate "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. 1973c.

> priate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Moreover, Section 5 is "expansive within its sphere of operation." *Presley*, 502 U.S. at 501. "[A]ll changes in voting must be precleared" (*ibid.*), even if they are "minor," and without regard to whether they have a racially discriminatory purpose or effect. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566, 570 (1969).

This Court has made clear that a voting change can be covered by Section 5 even if the change is not made by a governmental unit. The Court stated in *United States* v. *Board of Comm'rs*, 435 U.S. 110 (1978), that Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." *Id.* at 118.[4] In that respect, the Court explained, Section 5 is "like the constitutional provisions it is designed to implement," the Fourteenth and Fifteenth Amendments. *Ibid.* Those Amendments govern political party activities that are "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944); see also *Terry* v. *Adams*, 345 U.S. 461 (1953). The Court in *Board of Comm'rs* accordingly relied on cases

[4] Based on that statement, the Court in *Board of Comm'rs* held that Section 5 required preclearance of the decision of Sheffield, Alabama, to change from a commission form of government to a mayor-council form of government. 435 U.S. at 117-135. In so holding, the Court rejected Sheffield's argument that it was not covered by Section 5 because it was not a "political subdivision" as defined in the Act, since it had no power to register voters. 435 U.S. at 126-129. The Court subsequently relied on the statement in *Board of Comm'rs* quoted in the text, *supra*, to hold in *Dougherty County* v. *White*, 439 U.S. 32, 44 (1978), that Section 5 applied to a rule adopted by a county board of education requiring employees to take unpaid leaves of absence while running for elective public office.

interpreting the scope of the Fourteenth and Fifteenth Amendments to interpret the scope of Section 5. 435 U.S. at 127 (citing *Terry*).

In accordance with this Court's decisions, the Attorney General has interpreted Section 5 to apply to "[c]ertain activities of political parties." 28 C.F.R. 51.7. A regulation of the Attorney General adopted in 1981 states (*ibid.*):

> A change affecting voting effected by a political party is subject to the preclearance requirement [of Section 5]: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction * * *.

The regulation further states that, "[f]or example," Section 5 applies to "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen." *Ibid.*[5]

The lower federal courts have endorsed the criteria in the Attorney General's regulation. For example, the district court in *Hawthorne* v. *Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990), vacated as moot, 499 U.S. 933 (1991), held that Section 5 applied to changes in the method for selecting members of the Alabama State Democratic Executive Committee and members of certain County Democratic Executive Committees. 750 F. Supp. at 1094-1097. The court relied on its prior decision holding that "political parties in this state, to the extent they are empowered by the state to conduct primary elections and to have their national convention delegates selected, are subject to § 5." *Id.* at 1094 (citing *MacGuire* v.

[5] The regulation also provides examples of party activities that "are not subject to the preclearance requirement" of Section 5, including "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms." 28 C.F.R. 51.7.

Amos, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) (per curiam)). The court found further support for its holding in the Attorney General's regulation, which the court noted was "entitled to particular deference." 750 F. Supp. at 1094-1095 (quoting *Dougherty County* v. *White*, 439 U.S. 32, 39 (1978)).[6]

There is evidence that Congress also endorsed the Attorney General's criteria for Section 5 coverage of political parties. Even before adopting the current regulation in 1981 (quoted *supra*), the Attorney General precleared numerous proposed changes in party rules and on some occasions objected to such changes.[7] Evidence of the Attorney General's practice of preclearing some political party rules under Section 5 was before Congress when it reenacted the Voting Rights Act in June, 1982. See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Com.*, 97th Cong., 1st Sess. Pt. 3, at 2246, 2265 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General, to Rep. Edwards, listing objections, including ones filed against political parties). Although Congress amended other provisions of the Act in 1982, it did not amend Section 5 to exclude coverage of political parties. Moreover, Con-

[6] See also *Fortune* v. *Kings County Democratic Comm.*, 598 F. Supp. 761, 763, 765 (E.D.N.Y. 1984) (relying on Attorney General's regulation to hold that Section 5 applied to change affecting the voting membership of party's executive committee, where the committee performed "public electoral function[s]"); cf. *Wilson* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1302-1303 (M.D.N.C. 1970) (three-judge court) (Section 5 applied to "Rotation Agreement" that limited county from which party's state senatorial candidate could be selected).

[7] Of particular relevance, on April 12, 1982, the Attorney General precleared the delegate apportionment rules adopted by the Democratic Party of Virginia for its senatorial nominating convention to be held later that year.

gress rejected a number of proposals to restrict the scope of Section 5 in other ways. See *Hampton County Election Comm'n*, 470 U.S. at 176 & n.21. Under those circumstances, Congress's failure to restrict the scope of Section 5 in 1982 supports the Attorney General's interpretation of that provision as covering certain political party activities. Cf., *e.g.*, *Board of Comm'rs*, 435 U.S. at 133 (according "special significance" to testimony of Assistant Attorney General in congressional hearing explaining scope of Section 5).

B. Section 5 Applies To The Party's Decision To Charge A Fee To Convention Delegates, Because That Decision Involves The Exercise Of A State-Delegated Public Electoral Function And Affects "Voting" Within The Meaning Of The Act

Under the criteria adopted by the Attorney General and approved by the lower courts, Section 5 covers the decision of the Republican Party of Virginia to charge a fee to those who wished to participate in the process of nominating the Party's candidate for the 1994 election for the United States Senate. The Party's nomination process was, by operation of state law, "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. at 664. In addition, the decision to charge the fee affected voting in the general election.

1. Virginia law entitles the Party automatically to place its senatorial nominee on the general election ballot. See Va. Code Ann. § 24.2-511 (Michie 1993). It also authorizes the Party to choose the method it will use to select the candidate who gains this automatic access to the ballot. See *id.* §§ 24.2-508, 24.2-509(A). In deciding to select its senatorial nominee at a convention, the Party thus was "acting under authority explicitly * * * granted by" Virginia. 28 C.F.R. 51.7(b). The nomination process, moreover, was a "public electoral function," since

the nominee gained automatic access to a ballot for public office by operation of state law. 28 C.F.R. 51.7(a).[8]

This Court's decisions concerning the Fifteenth Amendment support the conclusion that, in charging a fee to convention delegates, the Party was exercising a state-delegated public electoral function. In *Smith* v. *Allwright, supra,* the Court held that a party rule excluding black people from voting in the party's primary was subject to the Fifteenth Amendment. 321 U.S. at 657-666. The Court relied on state laws regulating the conduct of primary elections and limiting the names that could appear on the general election ballot to the nominees selected by the primaries. *Id.* at 663. The Court reasoned that by virtue of those laws, the State "endorses, adopts, and enforces the discrimination" of the party in the primary. *Id.* at 664.

In *Terry* v. *Adams, supra,* the Court held that the "pre-primary" election held by the Jaybird Democratic Association, from which blacks were excluded, was subject to the Fifteenth Amendment. The Court determined that state law and the conduct of state officials caused the pre-primary effectively to supplant the later official primary conducted by the Democratic Party. See 345 U.S. at 469 (opinion of Black, J.); *id.* at 477 (opinion of Frankfurter, J.); *id.* at 482 (opinion of Clark, J.). The connection between the Jaybird pre-primary nomination process and the general election, however, was not as close as in the present case. Victors in the Jaybird pre-primary were not legally compelled to run in the later, official Democratic primary, see *Terry*, 345 U.S. at 463

[8] Not every political association is entitled to such preferential ballot access under Virginia law. While groups of people are free to join together, call themselves "political parties," hold conventions, and "nominate" candidates for office, the candidates they select are not entitled to automatic ballot access unless the group's nominee received at least 10% of the vote in any statewide election in the previous two election cycles. Va. Code Ann. § 24.2-101 (Michie 1993).

(opinion of Black, J.), and losers in the Jaybird pre-primary were not legally barred from running in the later primary. See *id.* at 483 n.13 (opinion of Clark, J.). Here, by contrast, the nominating convention by law controls a position on the general election ballot.

2. The Party's decision to impose the fee "affect[s] voting" (28 C.F.R. 51.7) in the general election. It does so by affecting the selection of candidates who gain automatic access to the general election ballot.

This Court has consistently held that changes in the procedures by which candidates gain positions on the general election ballot affect voting in the general election and are therefore covered by Section 5. In *Allen,* for example, the Court held that Section 5 applies to changes that make it more difficult for independent candidates to petition for a place on the general election ballot. See 393 U.S. at 551, 570. The Court reasoned that such changes affect voting because they "might * * * undermine the effectiveness of voters who wish to elect independent candidates." *Id.* at 570.[9] See also *Hampton County Election Comm'n,* 470 U.S. at 174-181 (Section 5 applied to change in length of time between candidate filing period and election); *Dougherty County,* 439 U.S. at 37-43 & n.10 (school board rule requiring candidates for office to take unpaid leave affected voting because it "tends to deny some voters the opportunity to vote for a candidate of their choosing") (internal quotation marks

[9] Justice Harlan agreed in *Allen* that these changes affected voting, and were therefore covered by Section 5, even though he took a different view of the scope of Section 5 than did the majority. He reasoned that, "[s]ince the Voting Rights Act explicitly covers 'primary' elections, see § 14(c)(1) [42 U.S.C. 1973*l*(c)(1)]," and since the petition procedure for independent candidates was "the functional equivalent of the political primary," there was "no good reason why it should not be included within the ambit of the Act." *Allen,* 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part). Here, the party convention is the "functional equivalent of the political primary."

omitted); *Fortune*, 598 F. Supp. at 765 (change in voting membership of party executive committee affected voting because the committee controlled access to the general election ballot in certain circumstances).

The Court has also recognized in an analogous context that changes in a party's nomination procedures may affect voting in the general election. In *United States* v. *Classic*, 313 U.S. 299 (1941), the Court held that Congress may, in exercising its constitutional power to regulate general congressional elections (U.S. Const. Art. I, § 4), also regulate congressional primary elections. 313 U.S. at 317-321. The Court reasoned that the selection of a party's nominee for public office at a primary may "affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary"; specifically, the exclusion of a candidate from the primary may "operate to deprive the voter of his constitutional right of choice" at the general election. *Id.* at 319; see also *id.* at 318 (Art. I, § 2 applies to primaries where they are "an integral part of the procedure of choice [of representatives to Congress], or where in fact the primary effectively controls the choice.").

The same reasoning applies when a party chooses its nominee by convention, rather than primary election. Justice Pitney (joined by Justices Brandeis and Clarke) made this clear in his concurrence in *Newberry* v. *United States*, 256 U.S. 232 (1921). In a discussion endorsed by the Court in *Classic*, 313 U.S. at 319, Justice Pitney concluded in *Newberry* that Congress has the power to regulate "primary elections and nominating conventions" that choose congressional candidates. 256 U.S. at 286 (Pitney, J., concurring). He considered this power to be necessarily implied in Congress's authority to regulate general elections because, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Ibid.*

C. The District Court Erred In Holding That Section 5 Never Applies To Party Conventions

1. The district court erred in holding that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." J.S. App. A8. In construing the scope of the Fifteenth Amendment, this Court has declined to allow "a variation of result" to follow "from so slight a change in form." *Smith* v. *Allwright*, 321 U.S. 649, 661 (1944). Similarly, the Court has held that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *Hampton County Election Comm'n*, 470 U.S. at 178; see also *Riddell* v. *National Democratic Party*, 508 F.2d 770, 774 (5th Cir. 1975); cf. *Newberry*, 256 U.S. at 286-287 (Pitney, J., concurring).

The district court ignored those principles. Whether a party selects a nominee at a primary or at a convention, it is exercising a state-delegated public electoral function if the nominee gains automatic access to the general election ballot. In either case, moreover, changes in the nomination process may affect voting in the general election by affecting the choices available to voters in that election. Under the district court's decision, however, Section 5 would not apply to a change in party rules, even if the change had a significant, discriminatory effect on voting in the general election, as long as the change related to the convention process.

The district court's decision thus permits a political party to avoid Section 5's preclearance requirement simply by selecting its nominees in a convention rather than a primary election. The initial change from a primary to a convention process would have to be precleared. See *Presley*, 502 U.S. at 501-503. But once the process is in place, the district court's decision would allow the party to adopt any kind of exclusion, no matter how invidious,

without having to preclear it. A party could, for example, even adopt a rule excluding black voters from serving as voting delegates to its convention. "The only recourse for the minority group members affected by such changes would be the one Congress implicitly found to be unsatisfactory: repeated litigation." *Board of Comm'rs*, 435 U.S. at 125. The district court's decision leads to consequences that Section 5 was designed to prevent.

2. In holding that Section 5 does not apply to party conventions, the district court relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6 1972), summarily aff'd, 409 U.S. 809 (1972). See J.S. App. A10. *Williams*, however, does not support the district court's decision.

In *Williams*, the district court held that Section 5 did not apply to a party's decision to change its method of selecting delegates to the party's national convention from an appointment system to a system under which delegates were chosen in open convention. The court stated that it was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard," and it quoted portions of the Act's legislative history stating that the election of delegates to party conventions would be covered by Section 5. See *Williams*, slip op. 4. The court reasoned, however, that, because the Act does not expressly authorize political parties to obtain preclearance, it provided "no way for the State Party to gain the required federal approval." Slip op. 5. Based on that understanding of the Act, the court concluded that Congress must not have intended the Voting Rights Act to apply to the changes adopted by the party. *Ibid.*

Although *Williams* concerned rules for a party convention, its reasoning would extend to rules for a party primary. In either context, such rules would fall outside Section 5 because the party could not "gain the required federal approval" of them. *Williams*, slip op. 5. Thus, the

reasoning of *Williams* conflicts with the recognition of the district court in this case that Section 5 *does* cover some changes in a party's rules for primary elections. See J.S. App. A8. More importantly, the reasoning of *Williams* cannot be reconciled with decisions of this Court after *Williams* holding that Section 5 "applies to all entities having power over any aspect of the electoral process within [covered] jurisdictions." *Board of Comm'rs*, 435 U.S. at 118; *Dougherty County*, 439 U.S. at 44.

Williams rested on a premise—that political parties cannot obtain preclearance of party rule changes—that is no longer true, if it ever was. Although the regulations implementing Section 5 did not explicitly so provide when *Williams* was decided, they now provide that "[a] change effected by a political party * * * may be submitted by an appropriate official of the political party." 28 C.F.R. 51.23(b). Because the lower court's decision in *Williams* is inconsistent with later decisions of this Court and rests upon a factual premise that no longer obtains, this Court's summary affirmance in *Williams* does not control the present case.

D. Section 5 Applies To Party Conventions In A Workable Manner

This Court has said that Section 5 should be construed to provide a "workable standard to determine when preclearance is required" under Section 5. *Presley*, 502 U.S. at 505. The Attorney General's regulation provides a workable standard for determining when changes in the rules for a party convention must be precleared under Section 5.[10]

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[10] Indeed, the very existence of the regulation distinguishes this case from *Presley*. The Attorney General had expressly refused to issue a regulation governing the type of change at issue in *Presley*—reallocation of authority among government officials—because he did "not believe that a sufficiently clear principle ha[d]

1. Political party conventions generally have three principal purposes: to nominate candidates to appear on the general election ballot; to draft the party platform; and to amend or adopt rules governing the administration of the party. Under the Attorney General's regulation, Section 5 applies to nomination-related activities; Section 5 does not, however, apply to any platform-drafting activities or to most administrative activities. That is because, for the most part, it is only in carrying out nomination-related activities that a party exercises a state-delegated public electoral function in a manner that may affect voting in the general election.[11]

Thus, party decisions about who may select the nominee are subject to Section 5 under the Attorney General's regulation. Cf. *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (per curiam) (Section 5 covers change from open to closed primary). So are decisions about the rules for nomination—regarding, for example, whether a majority, supermajority, or plurality vote is required for nomination—and about the rules governing the apportionment of voting power among delegates. Cf. *Port Arthur* v. *United States*, 459 U.S. 159, 165-168 (1982) (Section 5 covers majority-vote requirement for at-large city council seats); *Georgia* v. *United States*, 411 U.S. 526, 531-535 (1973) (Section 5 covers reapportionment). Such decisions affect the way in which party adherents select the party's nominee, and they therefore also affect the

yet emerged distinguishing covered from noncovered reallocations." 52 Fed. Reg. 486, 488 (1987) (notice of final rule). By contrast, the Attorney General delineated a sufficiently clear principle to distinguish covered from noncovered political party activities in 28 C.F.R. 51.7, and has applied the regulation to such activities for more than decade. Appellees do not claim that the application of that regulation has interfered unduly with political parties.

[11] Because local mass meetings are simply an earlier step in the party's exercise of its nominating function, the discussion in the text applies to rules governing them as well.

choices voters have at the general election. Moreover, those decisions have the potential to discriminate against minorities in the party and in the general electorate. See *Dougherty County*, 439 U.S. at 42.[12]

Many activities at a political party convention, however, are not subject to Section 5 under the Attorney General's regulation. Changes in the rules for drafting a party platform, for example, are not covered. See 28 C.F.R. 51.7. Although such changes might conceivably affect selection of the party's nominee—for example, by influencing the platform's substance and thereby inducing delegates to choose a candidate who agrees with its substance—that effect would not trigger Section 5 coverage for two reasons. First, the effect of a change in platform-drafting rules on voting in the general election would be remote and speculative; it would not have a "direct relation to, or impact on, voting." *Presley*, 502 U.S. at 506. Second, such a change reflects an exercise of the party's power to determine the political positions it will advocate, a power that the party possesses independently of its state-delegated authority to place a candidate on the general election ballot. For similar reasons, rules for convention debates are ordinarily not covered by Section 5 under the Attorney General's regulation.

Finally, most changes in the rules for the party's internal administration need not be precleared under the Attorney General's regulation. Those rules usually reflect the party's inherent power, like that of other associations, to regulate its day-to-day-operations. As such, they ordi-

[12] For similar reasons, when one of the purposes of a convention is to nominate a candidate whose name will appear on the general election ballot, the party's choice of where and when to hold its convention is covered by Section 5. Cf. *Perkins* v. *Matthews*, 400 U.S. 379, 387-388 (1971) (location of polling places is covered). Such choices might well have a discriminatory purpose if, for example, convention sites are selected "at distances remote from black communities or at places calculated to intimidate blacks from entering." *Id.* at 388.

narily fall outside Section 5, unless they relate to the performance of a state-delegated public electoral function or elections for party office. See pp. 9-13, *supra*; see also 42 U.S.C. 1973*l*(c)(1) ("voting" defined to include voting in elections for "party office"). In particular, preclearance generally would not be required for changes with respect to "the recruitment of party members" or "the conduct of political campaigns." 28 C.F.R. 51.7

2. Appellees contend that Section 5 cannot be applied to conventions in a workable manner because it is difficult for the Party to obtain preclearance of its convention rules. See Mot. to Affirm or Dismiss 5-8; Appellees' Suppl. Br. 4-9. They point out that, under the Party's current procedures, rules for a nominating conventions are not finally adopted until the convention itself takes place. That fact, however, does not justify construing Section 5 to exclude all changes in convention rules.

Nothing requires the Party to adopt its procedures at the convention; it could adopt those convention rules subject to Section 5 sufficiently in advance of the convention to permit preclearance. Indeed, the Party's decision to charge the fee at issue here was announced six months before the convention. See Johnson Aff. ¶ 16 & Exh. B. The Party could also adopt other nomination-related rules ahead of time. Thus, the Party's purported difficulties in complying with the preclearance requirement "are largely of [its] own making." *Hampton County Election Comm'n*, 470 U.S. at 180; see also *id.* at 179-180 (covered jurisdiction cannot avoid preclearance requirement by enacting voting changes meant to take effect before Attorney General completes administrative review).[13]

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[13] In addition, Section 5 provides for expedited review by the Attorney General "upon good cause shown." 42 U.S.C. 1973c; see 28 C.F.R. 51.34.

E. Section 5 Does Not Unconstitutionally Interfere With A Party's Freedom Of Association

The Party claims that application of Section 5 to changes in its convention rules would violate its freedom of association. Mot. to Affirm or Dismiss 10, citing, *inter alia*, *Democratic Party of United States* v. *Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). As discussed above, however, Section 5 applies only to political party activities that involve the exercise of a state-delegated public electoral function. The application of Section 5 to such activities does not unconstitutionally interfere with a party's freedom of association.

In *Smith* v. *Allwright*, *supra*, this Court rejected a claim strikingly similar to that asserted by the Party in this case. In *Allwright*, black voters argued that a rule of the Texas Democratic Party barring them from voting in the party's primary election violated the Fourteenth and Fifteenth Amendments. The party "defended [the rule] on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary." 321 U.S. at 657.

This Court rejected that defense. It held that, because the party's primary election was "a part of the machinery for choosing officials," *Allwright*, 321 U.S. at 664, the party's rule excluding blacks from voting in the primary was subject to the Fifteenth Amendment. The Court reasoned that "[t]he privilege of membership in a party may be * * * no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." *Id.* at 664-665. In *Terry* v. *Adams*, *supra*, the

Court relied on *Allwright* to declare unconstitutional an unofficial "pre-primary" election held by the Jaybird Democratic Association of Texas from which black voters were excluded. See 345 U.S. at 470; *id.* at 481-484 (Clark, J., concurring).

Allwright and *Terry* demonstrate that when a political party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Because "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in" that Amendment, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966), this rule extends to statutes, such as the Voting Rights Act, passed under Congress's "remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Ibid.*

Indeed, this Court has never found a violation of a political party's associational rights in the enforcement of a statute designed to prevent racial discrimination in voting. Decisions of this Court finding such a violation have expressly noted that the challenged government action was not taken to prevent racial discrimination. See, *e.g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 232 (1989) (citing *Smith* v. *Allwright*, *supra*); *O'Brien* v. *Brown*, 409 U.S. 1, 4 n.1 (1972) (per curiam) (citing *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, *supra*); see also *Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975) (en banc) (opinion of McGowan, J.) ("There are no racial or other invidious classifications here. If there were, the Party's entitlement to constitutional protection would be as slight as those of the victims would be strong.") (footnote omitted), cert. denied, 424 U.S. 933 (1976).[14]

[14] Under this Court's decisions, political parties have a constitutionally protected interest in deciding whether a party primary should be limited to party members or should be open to independent voters. See *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 215-216 (1986). Still, a party must preclear any decision to change from an open to a closed primary, or vice versa, see *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (per curiam). The Attorney General has on several occasions precleared parties' decisions to make such changes. These preclearance decisions include: Green Party of Alaska (June 25, 1992); Democratic Party of Alaska (Feb. 28, 1992); Republican Party of Alaska (May 21, 1991); Republican Party of Alaska (Sept. 18, 1990).

II. PRIVATE PARTIES MAY INVOKE THE REMEDIES AGAINST UNLAWFUL POLL TAXES IN SECTION 10 OF THE VOTING RIGHTS ACT

The three-judge court in this case held that private parties cannot avail themselves of the remedies against unlawful poll taxes in Section 10 of the Act. J.S. App. A11-A12. The court based that holding on the fact that (1) Section 10 does not expressly authorize private actions; and (2) Section 10 *does* expressly authorize actions by the Attorney General. The court's holding is at odds with this Court's decision in *Allen*.

In *Allen*, the Court held that private parties may obtain declaratory and injunctive relief against changes in voting that have not been precleared as required by Section 5. 393 U.S. at 555. The Court recognized that "[t]he Voting Rights Act does not explicitly grant * * * private parties" authority to enforce Section 5. 393 U.S. at 554. The Court found implicit authority for private enforcement, however, in the language of Section 5, analyzed "in light of the major purpose of the Act." 393 U.S. at 555. The Court reasoned that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557. Accordingly, the Court determined that "the specific references" in Section 12 of the Act, 42 U.S.C. 1973j, to actions by the Attorney General to enforce Section 5 "were included to

give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights," and not to bar private enforcement actions. 393 U.S. at 555 n.18.[15]

Allen strongly supports the conclusion that private parties may seek judicial enforcement of Section 10. Section 10 explicitly recognizes the right of each citizen to be free from unconstitutional poll taxes. 42 U.S.C. 1973h(a). That right likewise "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Allen*, 393 U.S. at 557. Accordingly, the provision in Section 10 authorizing enforcement by the Attorney General should be construed as giving her power to enforce "what might otherwise be viewed as 'private' rights," *Allen*, 393 U.S. at 555 n.18, and should not be construed to bar private enforcement of that Section.

In defending the district court's contrary holding, the Party observes that Section 10 does not create a substantive right to be free from poll taxes but instead merely provides a remedy for enforcing the proscription against poll taxes in the Fourteenth and Twenty-Fourth Amendments. Mot. to Affirm or Dismiss 16-17. That observation, while true, is beside the point. The Court in *Allen* rejected as irrelevant the argument that Section 5 did not create a substantive right but merely provided a remedy for violations of the Fifteenth Amendment (393 U.S. at 556 n.20):

> Appellees argue that § 5 * * * gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the

[15] Section 2 of the Act (42 U.S.C. 1973), like Section 5, does not expressly authorize private enforcement actions, and it is expressly enforceable by the Attorney General under Section 12. Although this Court has not explicitly addressed whether Section 2 authorizes private enforcement actions, it has repeatedly entertained such actions. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994).

> guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

Similarly, the fact that Section 10 does not confer any new right on individual voters—but only creates a remedy for violations of the Fourteenth and Twenty-Fourth Amendments—does not answer the question whether individual voters may avail themselves of that remedy. *Allen* dictates an affirmative answer to that question.[16]

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted.

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[16] We believe the dismissal of the Section 10 claim cannot be upheld on the alternative ground advanced by appellees, but not addressed by the three-judge court, that the Party's fee requirement is not a "poll tax." Mot. to Affirm or Dismiss 18. Appellants' complaint alleges a "poll tax * * * or substitute therefor" within the meaning of Section 10(b), 42 U.S.C. 1973h(b).

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